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No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ISAAC JAMES TINDLE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a defendant who establishes a *prima facie* case of intentional racial discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986), is denied due process and equal protection when the government is permitted to use *ex parte* evidence, the defendant is denied the opportunity to adduce evidence or to cross-examine the government's evidence, and the government's explanations for its peremptory strikes are pretextual on their face?

2. Whether the Fourth Circuit erred in upholding the trial court's decision not to give a requested entrapment instruction to the jury because such an instruction was allegedly inconsistent with a denial of guilt, when this Court's subsequent ruling in *Mathews v. United States*, 108 S. Ct. 883 (1988), establishes that the defendant was entitled to such an instruction?

LIST OF PARTIES

The parties to this petition and to the proceedings below are Isaac James Tindle and the United States Government.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Isaac James Tindle respectfully petitions this Court for a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals.

OPINIONS BELOW

The two opinions of the Fourth Circuit Court of Appeals are attached in the Appendix hereto.

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals, denying the petition for rehearing and suggestion of rehearing en banc, was entered on December 20, 1988. (Appendix, at 38a-39a) [hereinafter cited as 21a].[1] This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254.

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[1] Appendix cites are cited as ——a. Cites to the record on appeal below are designated J.A. ——.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment of the United States Constitution.

STATEMENT OF THE CASE

1. *The Case.* On November 10, 1983, the defendant Isaac James Tindle was found guilty by a jury in the District Court of Maryland of six substantive or conspiracy offenses related to his alleged distribution of heroin and was acquitted of the most serious charges made against him, managing a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. § 848. (21a). The district court, the Honorable Alexander Harvey, sentenced the defendant to an aggregate prison term of fifty years with a special parole term of ten years and a fine of one-hundred and fifty thousand dollars. (*Id.*).

During jury selection in defendant's trial, the government used five of its six peremptory juror challenges to strike all five prospective black members of the jury, leaving defendant, a black man, to be tried before an all white jury. (3a). At his trial, defendant contended that he was the victim of government entrapment. The district granted the defendant an entrapment instruction on one count of the indictment but refused to give an entrapment instruction on two other counts because the defendant had not admitted all elements of these offenses, and, according to the district court, the defendant was thereby barred from asserting an entrapment defense. (44a-45a).

The defendant appealed from his conviction, and on December 29, 1986, the Fourth Circuit rejected all but one ground of his appeal and remanded the case to the trial court for an inquiry pursuant to this Court's holding in *Batson v. Kentucky*, 476 U.S. 79 (1986) to deter-

mine whether the prosecution's exercise of its peremptory challenges was racially discriminatory. (37a). On remand, the government, conceding that the defendant had established a *prima facie* case of a *Batson* violation, contended that it could rebut this through proof of a neutral, nondiscriminatory explanation for each peremptory strike. Over the objection of the defendant, the district court permitted the government to submit *ex parte* evidence in support of its peremptory strikes. (10a-11a). The district court also denied defendant's motion for an evidentiary hearing into the issue of the prosecution's discriminatory intent. (J.A. 136). The district court relied on an affidavit submitted by the government attesting to the prosecutor's good faith (9a) but then refused to permit the defense to introduce its proffered testimony of witnesses to the contrary. (J.A. 138-39).

After hearing oral argument, the district court found that the government had rebutted the defendant's *prima facie Batson* showing and upheld defendant's conviction. Defendant then appealed, and, in a sharply divided opinion, the Fourth Circuit affirmed the district court's *Batson* findings.

2. *The Facts.* Prior to jury selection in defendant's case, the district court asked each prospective juror on the venire to stand and identify themselves in open court. (J.A. 145). After the defense objected that blacks were underrepresented on the venire because only seven were present out of a venire of approximately 64 jurors, the trial court identified each black prospective juror by name. (J.A. 208). The court conducted voir dire and then asked counsel to exercise their peremptory challenges on the remaining prospective jurors. The government used five of its six peremptory challenges to strike all of the five remaining blacks from the petit jury. None of these prospective black jurors had made any response to the questions propounded during voir dire.

At the close of the evidence, the defendant requested an entrapment instruction and the trial court found sufficient evidence existed of a lack of predisposition to warrant giving such an instruction. (45a-47a). While giving an entrapment instruction on one count, the court refused to give an entrapment instruction on two other counts because the defendant had not admitted that he had committed these offenses. (45a-46a). According to the trial court, the defendant was barred from asserting an entrapment defense unless he admitted guilt of every element of the counts charged. (*Id.*) In defendant's initial appeal, the Fourth Circuit rejected the defendant's claim that this was error and upheld the trial court's ruling on the unrelated ground that sufficient evidence of predisposition existed to justify not giving the requested entrapment instruction. (36a).

The government exercised its peremptory strikes in this case before this Court handed down its opinion in *Batson v. Kentucky*, 476 U.S. 79 (1986). When the prosecution was subsequently asked on remand to explain its motivation in striking all black members of the jury panel, it offered *ex parte* explanations and proof as well as public explanations. The *ex parte* proof consisted of, among other things, a copy of the government's annotated jury list (10a).

In its public explanation, the government indicated that it struck black juror Arlene Granderson allegedly because her name was similar to that of one Anthony Grandison, a defendant in an unrelated case, who had been prosecuted before by one of the prosecutors in defendant's case. The government justified its strike of black juror Walter Johnson on the grounds that he worked in Prince George's County, a county in which some drug activity allegedly took place in this case, and because although employed, a previous juror master list identified him as unemployed, giving the government pause because he may have been irregularly employed.

Black juror Riley Brothers was struck because he was physically large and the government anticipated that a codefendant would contend that he was being prosecuted solely because of his large size. Black juror Veronica Bell was struck because she was a security officer at a shopping mall in Baltimore known for its drug activity. The government also explained that it struck Ms. Bell because she was seen during the jury selection process talking with an unidentified person who had also spoken to an alleged co-conspirator during that break. (J.A. 101). While the government presumed "nothing improper" about these discussions, (J.A. 87) it did not want to embarrass her by inquiring about this conversation. Black juror John Smallwood was struck allegedly because he was a horse trainer and the government was afraid he would be contemptuous of two government witnesses who were horse trainers and would testify about their participation in tax fraud with a co-conspirator.

On remand, the defendant challenged those explanations on the ground that they were a mere pretext used to conceal the government's discriminatory intent. The district court refused to permit the defendant to introduce evidence, including the proffered testimony of a disinterested witness and other witnesses in support of this contention because the district court would not believe the proffered evidence if presented and because the government indicated that it would insist upon presenting several character and fact witnesses if a hearing were to be held and thus protract the proceedings. (J.A. 139). The trial court accepted and relied upon the public affidavit of the government's case agent, Lieutenant William Merritt of the Washington Metropolitan Police Department, a black man. In his affidavit, Lieutenant Merritt represented that neither he nor the white prosecutors involved used race as a factor in the exercise of peremptory challenges. (J.A. 102).

Judge Harvey denied defendant access to the *ex parte* evidence submitted by the government on the grounds argued by the government, namely, that (i) the notes were not discoverable under the Jencks Act or Fed.R. Crim.P. 16 or the work product doctrine; and (ii) disclosure would reveal government trial strategy. (J.A. 137).

Deprived of the opportunity to present testimony on the *Batson* issue, or to cross-examine or to confront any of the government's assertions, and also denied access to the government's *ex parte* proof, the defendant contended that the government's public explanations were patently pretextual. The trial court found, however, that the public and private explanations given by the government satisfactorily rebutted the defendant's *prima facie Batson* showing and upheld the defendant's convictions.

On appeal, a divided panel of the Fourth Circuit affirmed the factual findings of the district court and upheld the procedures employed by the district court to reach these findings. Specifically, the majority opinion upheld the use of *ex parte* procedures and affirmed the district court's finding that the reasons given by the prosecution, including both the public and the *ex parte* explanations, were both neutral and non-discriminatory. In dissent, Judge Murnaghan concluded that the district court erred in considering certain information, including the annotated jury list, on an *ex parte* basis and also concluded that the government's explanations for two of its peremptory strikes were so "flimsy" and "lame" that the district court clearly erred in not finding that they were a mere pretext aimed at concealing the prosecution's racially discrimatory intent. (17a).

ARGUMENT

I. The Fourth Circuit Failed to Enforce This Court's Holding in *Batson* and Authorized Factfinding Procedures Incompatible With This Court's Ruling and the Fifth Amendment.

In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court reaffirmed that racial discrimination has no place in our system of justice and urged lower courts to eliminate discriminatory jury selection practices by prosecutors not only for the sake of aggrieved defendants but also to preserve the integrity of our criminal justice system. Discrimination within our judicial system is the "most pernicious" form of discrimination because it corrodes the confidence of our society in the constitutional promise of equal protection under the law. *Batson*, 476 U.S. at 87-88. The principal cure formulated for this social evil by the *Batson* opinion is to subject the government's motivation for striking black jurors to public scrutiny in open court if a *prima facie* case of discrimination is established. This case raises important and troubling issues about the means by which this Court's admonition in *Batson* has been implemented and the results which have been obtained. In short, if the *Batson* inquiry conducted in this case is deemed sufficient, then, in the words of Judge Murnaghan's dissent below, "the burden explicitly assigned to the government by the Supreme Court in *Batson* becomes totally illusory." (19a).

This Court has recently granted review of a case in which the merits of a *Batson* inquiry and the scope of judicial review over such inquiries are also at issue. *See Tompkins v. Texas*, No. 87-6405, 108 S. Ct. 1727 (memorandum opinion granting certiorari), *as amended*, 108 S. Ct. 2818 (1988) (October Term, 1988). This case presents similar, though broader, issues concerning the means by which lower courts discharge their constitutional mission to examine prosecutorial intent in striking black jurors to ascertain whether they are faithful to

this Court's holding in *Batson*.[2] The methods endorsed by the Fourth Circuit for conducting a *Batson* inquiry promise to retard, rather than advance, the factual inquiry into prosecutorial intent constitutionally mandated after a *prima facie* case of racial discrimination has been found. Finally, the explanations offered by the prosecution, bearing no relation to this case, are indeed so "flimsy" and "lame" that they cannot seriously be characterized as anything other than a pretext for racial discrimination. (17a). (Murnaghan, J., dissenting). For these reasons, this Court should grant review to clarify that lower court inquiries into a *prima facie* case of racial discrimination in jury selection are not to be conducted through crabbed procedures inconsistent with traditional fact-finding and leading to results which immunize, rather than eradicate, racial discrimination.

A. The Procedures Authorized By the Fourth Circuit Deprived Defendant of a Meaningful Opportunity to Establish His *Batson* Claim.

In *Batson*, this Court overruled its prior precedent which had placed "a crippling burden of proof" on defendants to establish a claim of racial discrimination in the use of peremptory jury challenges. *Batson*, 476 U.S. at 92. This Court, however, declined "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenge." *Id.* at 99. This Court was motivated to so decline because the variety of jury selection practices in state and federal courts

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[2] The *Tompkins* case is similar to the present case in several respects. In both cases, the jury selection process took place prior to this Court's *Batson* opinion, thus requiring the court to conduct an historical examination of the prosecutor's prior intent. In both cases, defendants established a *prima facie* case of discrimination. Finally, in both cases, petitioners contend that the lower courts ignored objective evidence of discrimination, here by refusing petitioner an opportunity to present objective evidence and by ignoring facts in the record, and thus failed to heed this Court's instructions in *Batson*.

requires that trial courts be vested with ample discretion in responding to a *Batson* objection. *Id.* at n.24. Flexibility in responding to a *Batson* objection is essential; the need for this flexibility is substantially diminished, however, once the trial court has examined the defense objection and found a *prima facie* case of racial discrimination. Surely, at that juncture, the demands of the equal protection clause and due process require procedures adequate to conduct the fact finding on discriminatory intent required by the *Batson* opinion.

Critically, in *Batson*, this Court offered the standards and procedures developed in equal protection jurisprudence to guide lower courts in conducting *Batson* inquiries. *See id.* at 94 n.18. In particular, the *Batson* opinion held that defendant must first establish a *prima facie* case of discrimination, and then "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id.* at 97. Consistent with this Court's equal protection and Title VII jurisprudence, however, the *Batson* opinion clarified that the defendant "carries the ultimate burden of persuasion." *Id.* at 94 n.18. *citing Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981). Under this jurisprudence, however, once the alleged discriminator has rebutted the plaintiff's *prima facie* case, a third stage in the proceedings is required during which "the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Texas Department of Community Affairs*, 450 U.S. at 253.

In this case, the defendant was deprived of this opportunity to challenge the government's rebuttal of the *prima facie* case on grounds of pretext. Specifically, the trial court denied the defendant an evidentiary hearing wherein defendant could present testimony of witnesses who could provide evidence of discriminatory intent, denied the de-

fendant access to the evidence and explanations offered to the court *ex parte* by the government, and, most critically, denied the defendant the opportunity to cross-examine the bona fides of the government's explanations as these were tendered to the court by affidavit and argument. Denying defendant a meaningful opportunity to contest the ostensibly neutral reasons offered by the prosecution undermines the avowed purpose of the *Batson* holding to root out racial discrimination and has the effect of immunizing peremptory strikes from effective review once the government has mustered a neutral, if facile, explanation for its conduct.

Here, where the ultimate issue is the intent of the prosecution, and a strong showing of discrimination has been made, it is essential to the fact-finding process to allow the defense the means to challenge the ostensibly neutral explanations furnished by the prosecution.

The courts of appeal have taken conflicting views on this issue. In *United States v. Davis*, 809 F.2d 1194 (6th Cir.), *cert. denied*, 107 S. Ct. 3234 (1987), the Sixth Circuit held that once the defendant has established a *prima facie* case of racial discrimination under *Batson*, the defendant has no further role in influencing the trier of fact's findings, leaving the trier to consider only the government's explanation for its strikes. *Id.* at 1202 ("*Batson* does not require rebuttal of the Government's explanation by defense counsel.")

Likewise, here, the panel followed an earlier Fourth Circuit opinion which concluded that, once the government has articulated a credible neutral explanation, the task of the district court is over. *See United States v. Garrison*, 849 F.2d 103, 106 (4th Cir.), *cert. denied*, 109 S. Ct. 566 (1988), *quoted in Tindle.* (12a). In particular, the *Garrison* opinion stated that defendant's request to present testimony and cross-examine witnesses, "misperceives the *Batson* inquiry," (*id.*) and held that if

the trial court believes the neutral explanation provided by the government, the *Batson* inquiry is over. Petitioner respectfully submits that if this interpretation of *Batson* is sustained, the burden of proof on a defendant to prove discrimination under *Batson* will prove no less crippling than the burden of proof imposed by *Swain v. Alabama*, 380 U.S. 202 (1965).[3]

The Ninth Circuit, however, has held that "[a] district court must allow the defense to hear *and respond* to the prosecution's attempt to provide neutral explanations that rebut a *prima facie* case of discrimination." *United States v. Alcantar*, 832 F.2d 1175, 1180 (9th Cir. 1987) (emphasis added); *see also United States v. Chalan*, 812 F.2d 1302, 1314 (10th Cir. 1987) (remanding for evidentiary hearing on government's *Batson* explanations), *petition for certiorari filed August 8, 1988*. In the case currently pending before this Court, for example, the trial court conducted an evidentiary hearing at which testimony was taken of the prosecutor involved. *See Tompkins v. Texas*, No. 87-6405, Brief for Petitioner, at 7.

As predicted by Justice White in his concurring opinion, this Court's *Batson* decision has engendered much litigation. *Batson*, 476 U.S. at 102. It is important, therefore, that lower courts recognize that, while flexible procedures at the trial court level are important, a defendant nonetheless should be accorded a meaningful opportunity to meet the government's rebuttal of a *prima*

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[3] This Court, in *Franks v. Delaware*, 438 U.S. 154 (1978), held that an evidentiary hearing is required to examine the bona fides of an affiant for a search warrant once the defendant had presented a preliminary showing that the affiant deliberately or recklessly made false representations to secure a search warrant. Surely, no less is required when a defendant has demonstrated a *prima facie* case of racial discrimination and has proffered grounds to prove that the ostensibly neutral explanations provided by the government for its peremptory strikes are pretextual.

facie case of discrimination to sustain their ultimate burden of persuasion on the issue of discrimination. That is the traditional mode of proof under equal protection jurisprudence and it is appropriate that *Batson* inquiries follow this established factfinding procedure to determine the issue of discriminatory intent. Accordingly, review of this case is warranted to clarify that, once a *prima facie* case of discrimination triggers a *Batson* inquiry, the defendant must be accorded a meaningful opportunity to sustain his burden of proof by challenging the government's allegedly neutral explanation by proving pretext. *Cf. Texas Department of Community Affairs*, 450 U.S. at 215.

The pivotal significance of this opportunity is most compelling in a case, like this one, where the defendant's *prima facie* showing is strong and, in the words of the dissent below, the government's "neutral" explanations for its peremptory strikes are facially "flimsy" and "lame." (17a). Thus, the courts below failed to heed this Court's instruction in *Batson* that, "[W]hen circumstances suggest the need, the trial court must undertake a 'factual inquiry' that 'takes into account all possible explanatory factors' in the particular case." *Batson*, 476 U.S. at 95.

B. The Prosecution's Use of *Ex Parte* Explanations to Rebut Defendant's *Prima Facie* Case of Discrimination Violated Due Process and Presents an Important Issue for Review.

In this case, the government submitted *ex parte* material to the district court to sustain its burden of rebutting the defendant's *prima facie* case. The government justified its refusal to provide defendant with this *ex parte* material because it allegedly was not discoverable under the criminal discovery rules and allegedly would compromise the government's trial strategy. The Fourth Circuit affirmed the district court's approval of this procedure because it found these reasons to be "com-

pelling." (12a). The dissent accurately rejected these justifications for proceeding *ex parte*, observing that the government elected to place these materials at issue, thus making the discovery rules inapposite and noting that, because the trial took place years ago, disclosure of prosecutorial trial strategy could hardly be a legitimate concern. (14a-15a). Nonetheless, the majority opinion upheld the use of *ex parte Batson* procedures, preferring instead to defer to the district court's finding that such procedures were necessary.

Again, the courts of appeal have split on the constitutionality of *ex parte* rebuttals of a *Batson prima facie* case by the government. The Sixth and the Seventh Circuits have upheld the constitutionality of conducting *Batson* inquiries *ex parte*. *See United States v. Davis*, 809 F.2d 1194, 1202 (6th Cir. 1987); *United States v. Tucker*, 836 F.2d 334, 340 (7th Cir. 1988) (disagreeing with Ninth Circuit's contrary holding). The Ninth Circuit has held that *ex parte* proceedings violate due process in the absence of some compelling justification such as the need to avoid disclosure of trial strategy. *United States v. Thompson*, 827 F.2d 1254, 1259 (9th Cir. 1987) (Kozinski, J.).

In critical part, the positions of the respective courts of appeal are derivative of their perception of the appropriate role of the defendant in conducting a *Batson* inquiry. Thus, the Sixth Circuit, which recognizes no role for defendant after establishing a *prima facie* case of discrimination, authorized district courts "to hear from the Government under whatever circumstances the district court felt appropriate," including *ex parte* submissions. *Davis*, 809 F.2d at 1202. Starting from this same assumption, the Seventh Circuit "agree[d] with the Sixth Circuit" and found *ex parte* proceedings constitutionally adequate, *Tucker*, 836 F.2d at 340, leaving the matter wholly to the discretion of the trial courts. Expressly disagreeing with the Ninth Circuit's contrary

holding, the Seventh Circuit concluded that compelling circumstances were not necessary to justify *ex parte* proceedings and observed that "we believe that the prosecution could have explained its reasons . . . in open court." *Tucker*, 836 F.2d at 341.

The Fourth Circuit's position, while not articulated with precision, is properly aligned with that of the Seventh Circuit. Thus, the Fourth Circuit travels from the premise that the defense has no role to play after producing a *prima facie Batson* case, *Garrison*, 849 F.2d at 106; (8a), to reach the same destination as that of the Seventh Circuit, meaning that "it is up to the trial judge to determine what procedure is best-suited for a particular case." (12a). Thus, the Fourth Circuit follows the Seventh and the Sixth Circuits in holding that the due process clause does not restrict the exercise of the district court's discretion to use *ex parte* procedures to conduct a *Batson* inquiry.

Contrary to the Seventh and Sixth Circuits, however, the Fourth Circuit has adopted the Ninth Circuit's compelling need standard as appropriate for determining whether the district court properly exercised its discretion to use *ex parte* procedures in *Batson* inquiries. *Garrison*, 849 F.2d at 106, *citing Thompson*, 827 F.2d at 1258; 12a, *quoting Garrison*. Notwithstanding the adoption of the compelling need exception to the presumption of a public *Batson* inquiry, the facts of this case abundantly demonstrate that this exception is capable of swallowing the general rule. For example, if the risk of disclosing trial strategy is sufficient to justify *ex parte* procedures even in cases where the *Batson* inquiry is conducted long after trial, then the compelling need exception may easily cloak all *Batson* inquiries. Moreover, if the government's annotated jury list in this case poses a serious danger to prejudice the government's now public trial strategy, then it is difficult to conceive of any contemporaneous tangible evidence in the government's

possession that would not fall within this exception. This would reverse our time-honored presumption of public justice and replace it with a private inquiry into the discriminatory intent of our government's representatives.

The need to place reasonable limitations on the government's ability to proceed *ex parte*, however, is especially important in a *Batson* inquiry, which is aimed in significant part at preventing the undermining of "*public* confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87 (emphasis added). *Accord Tindle*, 15a-16a (Murnaghan, J., dissenting). *Cf. Wheat v. United States*, 108 S. Ct. 1692, 1694 (1988) (federal courts have independent interest in ensuring that criminal trials appear fair to all who observe them). Accordingly, this Court should grant review to resolve the conflict in the circuits over whether the due process clause limits a trial court's ability to conduct a *Batson* inquiry *ex parte* and if so, whether the government has presented sufficient grounds in this case to fall within any reasonable exception to the presumptively public adjudication of allegations of discriminatory intent.

C. This Case Presents an Important Issue Concerning the Government's Obligation Under *Batson* to Establish a Neutral, Non-pretextual Explanation for Its Peremptory Strikes.

The explanations furnished by the prosecution in this case to rebut the defendant's *prima facie* case of discrimination cannot withstand serious scrutiny. As observed by Judge Murnaghan writing in dissent, not only are the government's explanations "lame" and "flimsy," if they suffice to discharge the government's burden of rebutting a *prima facie* case, then "the burden explicitly assigned to the government by the Supreme Court in *Batson* becomes totally illusory." (19a). In upholding the trial court's finding that the government's explanations satisfy *Batson*, the majority opinion and the district court below departed from the letter and spirit of this

Court's *Batson* opinion and refused to subject the government's explanations to anything more than a perfunctory examination to ascertain whether they met the test of neutrality. Although a trial court's factual findings are entitled to deference, *Batson*, 476 U.S. at 98, this is no justification for ignoring the objective record or common sense in considering the merits of the government's *Batson* rebuttal. Especially where, as here, the *Batson* inquiry has proceeded *ex parte* and without affording defendant a meaningful opportunity to make a pretext showing, the deference normally accorded trial court factual findings is not warranted.

In *Batson*, this Court expressly held that to satisfy its burden, the government "must articulate a netural explanation *related to the particular case to be tried.*" *Id.* (emphasis added). In addition, this Court further held that the prosecution may not rebut the defendant's case "merely by denying that he had a discriminatory motive or 'affirming his good faith in individual selections.'" *Id.*, *quoting Alexander v. Louisiana*, 405 U.S. 625, 632 (1972). The government's explanations in this case are facially defective under either standard.

For example, the government's heavy reliance on the self-serving affidavit of its case agent, Lieutenant Merritt, who asserted that he fully participated in the jury selection process, to prove the absence of bad faith on his part or that of the two prosecutor's involved, is nothing more than a government effort to meet its burden by bald assertions of good faith. Yet, both the district court and the majority opinion below placed great weight on the case agent's affidavit of prosecutorial good faith (4a), while at the same time these affirmations of good faith were shielded from the test of cross-examination.[4]

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[4] In his affidavit, Lieutenant Merritt, a Washington, D.C. police officer, claimed that he was primarily responsible for the decision to prosecute petitioner in Maryland, as oposed to Washington, D.C.

Likewise, several of the government's *Batson* explanations here are unrelated to this case. For instance, the government's explanation for the strike of Mrs. Granderson—that she had a name resembling that of a defendant in another case—is unrelated to the facts of this case.[5] The government explained to the Fourth Circuit that it was not concerned that Mrs. Granderson might actually be related to Mr. Grandison but rather that the alleged resemblance of the two names might cause confusion and embarrassment to her and the other jurors.[6] Similarly, the fact that prospective black juror Walter Johnson worked in Prince Georges County, Maryland is only related to this case if one indulges the assumption that everyone working in Prince George's County is unable to serve as an impartial juror in a case involving allegations of drug activity in that County.[7] The fact that Mr. Johnson may have been unemployed at some time prior to the trial has no perceptible bearing on his ability to be an impartial juror at the time of trial. Prospective juror Bell's employment as a security guard at a Baltimore mall allegedly the site of drug activity, should also have no bearing on her ability to serve as a juror. As to juror Bell's alleged conversation during a break in voir dire with an unidentified person who also

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(J.A. 102) In the District of Columbia, the probability of black representation on a jury is almost certain whereas the same cannot be said for criminal cases tried in the State of Maryland.

[5] *Compare Gamble v. State*, 257 Ga. 325, 357 S.E.2d 792 (1987) (*Batson* explanation that black juror had same name as defendant previously prosecuted by prosecutor is pretextual; contrary conclusion of trial court clearly erroneous).

[6] The prosecution's professions of concern over embrrassment to juror Granderson are difficult to square with the procedures adopted by the district court in asking sensitive voir dire questions, such as taking questions about criminal conduct by family members at the bench and out of the hearing of the venire. (J.A. 181).

[7] Indeed, such an assumption would appear inconsistent with the statutory and constitutional venue rights of a defendant. *See* United States Constitution, Article III, section 2, paragraph 3 & Amendment VI; Fed.R.Crim.P. 18.

had a discussion with an alleged co-conspirator, the government's contention that they struck her because they were afraid to embarrass her by asking about this alleged incident is patently implausible, especially when the government itself acknowledges that "nothing improper was presumed about these discussions." (Government Memorandum, J.A. 87).

Moreover, the reasons given for striking black jurors were not applied by the prosecution to similarly situated white jurors. Government's strikes for reasons not applied equally to similarly situated white jurors is a widely recognized indicia of the use of a pretext explanation to justify discrimination. *See, e.g., United States v. Wilson*, 853 F.2d 606, 610 (8th Cir.), *rehearing en banc granted*, 861 F.2d 514 (1988); *State v. Slappy*, 522 So.2d 18, 22 (Fla.), *cert. denied*, 198 S. Ct. 2873 (1988). *Gamble*, 357 S.E.2d at 796. Thus, for example, the government justification for striking black jurors Johnson and Brothers because they lived or worked in Prince George's County cannot be squared with the government's treatment of three white jurors that served on the petit jury who either worked or lived in Prince George's County.[8]

Finally, the prosecution suggested that it did not know whether juror Johnson was black or white because it was operating solely from the written juror lists which fail to designate race. Even assuming that the prosecution failed to observe the venire members when they stood up and identified themselves, and assuming further that the prosecution failed to hear the trial judge reciting the names of each black juror, this suggestion by the govern-

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[8] The government defended its different treatment of one of these three white jurors by asserting that it had the opportunity to observe one of them (Denise Herbert, Juror No. 333) because of her response during voir dire about changing her name after marriage and her sister-in-law's employment at the Justice Department. The government did not offer any reason why it did not strike white jurors Nos. 166 and 250 who lived or resided in Prince George's County.

ment is belied by the prosecution's own explanation for striking black juror Brothers—struck allegedly because of his large size and appearance, characteristics which do not appear on the written juror list. As Judge Murnaghan observed, "Once a prima facie case has been made out, it does not require a particularly suspicious mind to conclude that a prosecutor's selective memory about the racial characteristics of potential jurors cannot be countenanced." (18a).

Justice Marshall noted in his concurring opinion in *Batson* that "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror." *Batson*, 476 U.S. at 106. Moreover, a pretextual explanation will invariably be a neutral one; the difficulty lies in discerning whether a neutral reason is a pretextual one. Petitioner respectfully submits that if the Fourth Circuit's perfunctory examination of the prosecution's explanations in this case is all that the equal protection clause requires, then it truly promises no protection against racial discrimination by the prosecution in criminal cases. In his dissent below, Judge Murnaghan cogently concluded that, "[i]f the pretext inquiry is to be at all meaningful," the government's flimsy and lame explanations for striking black jurors Granderson and Johnson must be labelled as pretextual. (17a).

II. The Fourth Circuit's Opinion Upholding the District Court's Refusal to Give an Entrapment Instruction Should Be Vacated in Light of This Court's Decision in *Mathews v. United States*.

The Fourth Circuit, without the benefit of this Court's decision in *Mathews v. United States*, 108 S. Ct. 883 (1988), affirmed the district court's ruling that Mr. Tindle was not entitled to an entrapment defense as to Counts 10 and 13 of the indictment. Mr. Tindle was subsequently convicted on both of those counts and sentenced to five years pursuant to Count 10, to run consecutive to Counts 1, 6 and 9, and fifteen years pursuant to Count 13, to run consecutive to Count 8 and concurrent

to other counts. (J.A. 1587).[9] His total sentence is fifty years, with a special parole term of ten years. The sentences on Counts 10 and 13 affect both his aggregate sentence and parole eligibility.

The basis for the district court's decision to refuse to give the requested instruction was announced at an instruction conference. The district court stated:

> I will instruct the jury that the defense of entrapment is not available as to Counts 10 and 13. *It's abundantly clear that the defendant must admit the crime before he can raise that defense.* . . . [T]he law is very clear that you don't get entrapment unless you committed the offense. . . . So entrapment is one of the places where you have to fish or cut bait. You can't have it both ways. And his defense, from what he said on the stand, was that he didn't do it. So I will instruct the jury accordingly as far as entrapment is concerned.

(45a-46a) (emphasis supplied). This ruling followed a lengthy colloquy between the court and defense counsel, wherein counsel vigorously asserted that his client was entitled to an entrapment defense instruction as to each of Counts 8, 9, 10 and 13.

The trial court did grant an entrapment instruction as to Count 9, on the grounds that the court found that Mr. Tindle had admitted participation in the commission of the crime alleged. (45a). The district court erroneously concluded, however, that Mr. Tindle was not entitled to entrapment instructions on Counts 10 and 13 because he did not admit to all of the elements of the crimes charged. In *Mathews v. United States*, however, this Court held to the contrary, reversing a defendant's conviction where the district court had ruled "that entrapment was not available to petitioner because he would not admit all of the elements of the offense charged." 108 S. Ct. at 885.

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[9] Sentencing transcript in first appeal.

In *Mathews*, Chief Justice Rehnquist, writing for the majority, dismissed the government's assertion that a defendant should not be allowed both to deny the offense and to rely on the affirmative defense of entrapment. Yet, this is precisely the grounds upon which the district court denied Mr. Tindle an entrapment instruction as to Counts 10 and 13. The Fourth Circuit in this case did not resolve the issue in those terms, but rather chose to affirm by finding that there was ample evidence of predisposition so that an entrapment instruction was unnecessary, a rationale expressly rejected by the district court.

Indeed, the district court found that there was sufficient evidence of both lack of pre-disposition and inducement to go to the jury. (47a). The trial judge responded to the government's challenge to any entrapment instruction as follows: "All right, you're requesting that I not give it at all because the predisposition or lack of inducement—and I'll rule against the government on that." *Id.* The district court further concluded that an entrapment instruction was appropriate as to Count 9, while concluding that an entrapment instruction was inappropriate for Counts 10 and 13 for the reasons previously indicated —the court's incorrect understanding as to the availability of an entrapment defense where the defendant does not admit to all elements of the offense.

Thus, the district court, which was in the best position to evaluate the evidence, concluded that evidence of predisposition did not obviate the entrapment defense. The Court of Appeals, by implicitly rejecting this finding by the district court, has rendered an opinion which conflicts with opinions from other circuits which have held that the defendant need only create a factual issue to receive the entrapment instruction. *See, e.g., United States v. Rodriguez*, 858 F.2d 809, 814 (1st Cir. 1988) (vacating defendant's conviction); *United States v. Fadel*, 844 F.2d 1425, 1430 (10th Cir. 1988) (vacating defendant's conviction); *United States v. Fleishman*, 684 F.2d 1329, 1342 (9th Cir.), *cert. denied*, 459 U.S. 1044 (1982) (affirming

conviction where record was void of any evidence of lack of pre-disposition). By testifying that he had retired from criminal activity long before he was approached by government agent Shelton, Mr. Tindle created the factual issue which the jury had to decide—whether or not he was pre-disposed. In light of the doctrine that a party is entitled to a charge if the record, "viewed most charitably to the proponent of the instruction, furnishes an arguable basis for application of the proposed rule," *Rodriguez*, 858 F.2d at 813, Mr. Tindle was certainly entitled to the entrapment instruction, as the trial court so found.

The Court of Appeals' opinion does not even acknowledge the district court's finding regarding lack of pre-disposition. Surely the district court was "in a much better position to evaluate the sufficiency of the evidence that was presented" than was the Court of Appeals. *See United States v. Graham*, 856 F.2d 756, 763 (6th Cir. 1988) (remanding case to *district court* for a determination whether there was sufficient evidence to warrant an entrapment instruction), *petition for certiorari filed November 8, 1988.*

Moreover, the Fourth Circuit tacitly conceded that the record contains evidence of lack of pre-disposition. It upheld the district court's ruling that Mr. Tindle could not call D.E.A. agent Feldman to testify "that Tindle rejected opportunities to engage in drug deals with Feldman when Suskind offered them." (31a). Herbert Suskind was Mr. Tindle's business attorney who introduced Agent Feldman, then acting undercover and posing as a criminal, to defendant. The Court of Appeals agreed with the district court that such evidence was cumulative and therefore unnecessary. Yet, the Court of Appeals later concluded that "Tindle starkly failed to make a showing of unreadiness on his part or of persuasion by the government." (36a). If there were no evidence of unreadiness, how could the Court of Appeals conclude that the evidence of lack of pre-disposition was cumulative?

This Court explained in *Mathews* that the entrapment instruction is appropriate "whenever there is sufficient evidence from which a reasonable jury could find entrapment." 108 S. Ct. at 886. The district court, with all of the evidence before it, concluded that there was sufficient evidence from which a jury could find entrapment, assuming that Mr. Tindle had admitted to every element of Counts 10 and 13.

Accordingly, in light of *Mathews v. United States*, this Could should vacate Mr. Tindle's conviction as to Counts 10 and 13, and remand to the trial court for a new trial as to those counts.

CONCLUSION

For the foregoing reasons, this Court should grant review to address the important *Batson* and entrapment issues presented in this case. This Court has a vital interest in preserving the integrity of our criminal justice system from the corrupting influence of racial discrimination. It is imperative, therefore, that this Court insure that lower courts are vigilant in eliminating this evil and that they provide defendants with procedures adequate to accomplish this difficult task. As this Court reaffirmed in *Batson*, racial discrimination must find no home in our federal system of justice. Accordingly, Petitioner respectfully submits that this Court should grant review of the significant issues in this case.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-6096

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ISAAC JAMES TINDLE,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Alexander Harvey II,
Chief District Judge—(CR 83-154-H)

Argued: April 6, 1988 Decided: October 25, 1988

Before MURNAGHAN and CHAPMAN, Circuit Judges, and MACKENZIE, Senior District Judge from the Eastern District of Virginia, sitting by designation.

Terrance G. Reed (Timothy D. Junkin, Henry W. Asbill, L. Barrett Boss, ASBILL, JUNKIN, MYERS &

BUFFONE, CHARTERED on brief) for Appellant. Ty Cobb, Special Assistant United States Attorney (Breckinridge L. Willcox, United States Attorney; Donna Helen Triptow, Assistant United States Attorney on brief) for Appellee.

CHAPMAN, Circuit Judge:

In *United States v. Tindle*, 808 F.2d 319 (4th Cir. 1986) we affirmed the various heroin related convictions of the appellant, but we remanded the case to the district court pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986) to decide whether there was any merit to Tindle's claim that blacks were systematically excluded from his trial jury. Following remand, the district court conducted two conferences with the attorneys. The appellant's attorneys filed a motion for a new trial, and thereafter a supplemental pleading and an affidavit. The United States Attorney submitted a public filing outlining his reasons for exercising the peremptory challenges in the case, and he also submitted an *in camera* filing. Thereafter, the district court heard oral argument and issued a twenty-three page memorandum opinion denying the motion for a new trial, denying the appellant's request for an evidentiary hearing in the case, and finding that the United States Attorney had not systematically excluded black jurors from the trial jury in violation of Tindle's equal protection rights.

The appellant has appealed contending that it was error for the trial judge to allow the government to discharge its burden under *Batson* with some evidence being submitted to the court *in camera*, and in failing to provide the appellant with an evidentiary hearing at which he could call the government attorneys and others as witnesses. We find no merit to these claims, and we affirm.

I

The facts underlying Tindle's conviction are more completely outlined in our prior opinion, but they reflect a drug operation that was extensive, that generated large sums of money, and that was accompanied by widespread violence. Tindle, a black male, was indicted with thirteen co-defendants for various narcotic offenses. Prior to trial most of the defendants entered pleas of guilty, and only Tindle, Harris and Gladden went to trial. Several days into the trial, both Harris and Gladden changed their pleas to guilty.

In the United States District Court for Maryland attorneys select jurors from a list of venire members provided by the Clerk of Court. This list contains the name, age, address, marital status and employment of the prospective juror. The list does not contain any indication as to race. In exercising peremptory challenges the attorneys strike from the list. At Tindle's trial the defendants were granted three extra peremptory challenges for a total of thirteen and the United States was allowed six under Fed. R. Crim. P. 24(b). The trial judge conducted the voir dire of the venire and then permitted the attorneys to leave the courtroom to discuss and decide how to exercise their challenges. The peremptory challenges were made by striking the name of the challenged venire person from the list. When the attorneys returned to the courtroom they submitted to the courtroom deputy clerk their separate list showing their peremptory challenges. The remaining venire persons were called and became the trial jury.

The list of prospective jurors submitted to counsel by the courtroom deputy clerk contained thirty-one names. The defendants struck thirteen, the government struck six. Of its six peremptory challenges, the government used five to strike black jurors, and the jury, which tried Tindle, was entirely white. Upon remand the trial judge

concluded that this use of five peremptory challenges against black jurors made out a prima facie case of discrimination under *Batson*. At this point, the trial judge advised the United States Attorney that the burden had shifted to him to come forward with a racially neutral explanation for challenging each black juror. The record disclosed that the government had exercised its peremptory challenges as follows:

Juror No. 78—John A. Smallwood, Sr., a black.

Juror No. 91—Riley Brothers, Jr., a black.

Juror No. 102—Walter H. Johnson, Jr., a black.

Juror No. 54—Dennis J. Sesplankis, a white.

Juror No. 295—Veronica Bell, a black.

Juror No. 314—Arlene A. Granderson, a black.

The government submitted an affidavit of Lt. William Merritt of the Metropolitan District of Columbia Police Department, who was the case agent in the investigation and prosecution of this case, and he was present at the prosecution table throughout the trial. He participated with the government attorneys in selecting the jury and deciding which members of the venire to strike. Lt. Merritt is black and is a twenty-year veteran of the police department and in his affidavit he swears that at no time was race mentioned as a factor in the exercise of the government's peremptory challenges, and that he agreed with the challenges as exercised. His affidavit also states that he would not be a party to any effort to use race as a factor to eliminate black jurors. Merritt's affidavit also explains the reasons for exercising most of the peremptory challenges used by the government and such reasons are racially neutral.

Before the district judge, the government attorney explained his strategy in selecting the jury and his use of his challenges. He also submitted to the judge *in*

camera the notes used by him in the selection of the jury, and certain other sensitive information that he relied upon in selecting the jury. He asserted that this information, if made public, could embarrass and endanger individuals, including venire persons, and that certain of the information was work product.

The district court found in its order that the reasons advanced by the government articulated a neutral explanation for each of the peremptory challenges, and that these explanations were clear, reasonably specific and met the prosecution's burden under *Batson* of rebutting the defendant's *prima facie* case. The court also concluded that these explanations were not pretextual.

The defendant's presentation was marked by a confusion as to the race of certain jurors and as to which side had exercised the challenge. The defendant also submitted an affidavit of one David Hughes dated April 1, 1987, more than three years after the trial, in which he swore that Mr. Cobb, the Assistant United States Attorney trying the case, advised Hughes that he had purposely struck all of the blacks from the jury. In these matters the trial judge determines issues of credibility, and it is easy to see why no weight was given to this affidavit. Hughes was co-conspirator of Tindle, he had been used by Tindle to launder large sums of money, and he had already entered a guilty plea and been sentenced for his part in the offenses covered by the indictment. Hughes gave no indication of why Mr. Cobb, or any other government attorney, would make such a confession to a convicted felon, and why, if this charge were true, he waited over three years to come forward. An earlier Hughes affidavit was attached to a supplemental brief submitted to our court when the first appeal was argued in August, 1985, and it made no mention of such a statement by Mr. Cobb.

At the remand hearing the government explained that it had challenged Juror Veronica Bell, who was black,

thirty-five years of age, divorced and employed as a security officer at Mondawmin Mall in Baltimore, because this mall has long been associated by law enforcement officers with narcotics trafficking, and narcotics organizations purchased cutting materials and other supplies at the mall. At a recess prior to jury selection, Juror Bell was observed conversing with individuals associated with the co-defendant Harris. This explanation was found by the district court to be neutral, not pretextual and true. We agree.

Arlene Granderson was a black female, forty-five years of age and employed at the Department of Health and Human Services. The government explained its strike of her because her name closely resembled that of Anthony Grandison, who had been a defendant in a trial involving the murder of two government witnesses. The Grandison trial had been handled by Assistant United States Attorney Cobb, the same person representing the government in the Tindle case. We agree with the district judge that this was neutral and non-pretextual reason to challenge.

Juror Riley Brothers, Jr. was a black, thirty-six years of age and a bus driver working for the Washington Metropolitan Transit Authority. He lived in Suitland, Maryland and Tindle's telephone records indicated a large number of calls to participants in Tindle narcotics operation in Suitland. Also, Juror Brothers was similar in size and appearance to the defendant Gladden, and Gladden had argued that he had been mistakenly identified and was being prosecuted solely because of his size and appearance. We agree with the district judge that this was a neutral and non-pretextual reason for the government to exercise a challenge.

Juror Walter H. Johnson, Jr. was listed as being thirty years of age and a construction laborer residing in Beltsville, Maryland. The master jury list showed him unemployed, but the government thought that he had been

employed in an area of Prince George's County near the Tindle narcotics operation. The government did not have a record of Johnson's race and since the selection of the jury was from a list of names that does not indicate race, and the challenges were exercised out of the presence of the venire, the court found that this would not be unusual, and that this was a neutral and non-pretextual reason to exercise a challenge. We agree.

Juror John A. Smallwood, Sr. was listed as a horse trainer, and the government explained that this challenge was made because of his employment. Two government witnesses were horse trainers and they had been involved in illegal activities with Tindle and a co-defendant. These witnesses admitted their fraudulent conduct on the stand, and the government excused horse trainer Smallwood because of its fear that he would be contemptuous of these witnesses and not accept their testimony. The district court found that this was a neutral and non-pretextual reason to exercise a challenge, and we agree.

Under *Batson* a defendant may establish a *prima facie* case by showing that he is a member of a cognizable racial group, and that the prosecutor exercised peremptory challenges to remove members of his race from the venire. The burden then shifts to the government to come forward with neutral explanation for its challenges of black jurors. At this point:

> The trial court then will have the duty to determine if the defendant has established purposeful discrimination.

476 U.S. at 98. These are factual findings and, under *Anderson v. Bessemer City*, 470 U.S. 564 (1985), they may only be disturbed on appeal if they are found to be clearly erroneous. *United States v. Hamilton*, —— F.2d —— No. 87-5100 (4th Cir. 1988). Applying this standard, we conclude that the trial court's determinations are not clearly erroneous.

III

Appellant claims that a *Batson* inquiry requires an evidentiary hearing at which he would be allowed to call witnesses, and to cross-examine the prosecutors, and, in the present case, cross-examine Lt. Merritt. There is no absolute right to an evidentiary hearing. *Batson* answers this claim as follows:

> In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct these courts how best to implement our holding today.

476 U.S. at 99-100 n.24.

We have held that the conducting of an evidentiary hearing is within the sound discretion of the district court. In *United States v. Garrison*, —— F.2d —— No. 87-7649 (4th Cir. 1988) we stated:

> Garrison's insistence on an evidentiary hearing in which prosecutors and defense attorneys and possibly other witnesses would be examined and cross-examined misconceives the *Batson* inquiry. Although a district court could conduct such a hearing if it believed circumstances warranted it, *Batson* does not require this intrusion on the trial proceedings. When, as here, the defendant made out a *prima facie* case of a [sic] discrimination, *Batson* requires the prosecutor to 'articulate a neutral explanation related to to the particular case . . . .' 476 U.S. at 98. The explanation given by the prosecutor satisfied *Batson's* requirement for neutrality. The prosecutor is justified in striking jurors that he or she perceives to be inattentive or uninterested. If the trial court believes the prosecutor's explanation, a reviewing court ordinarily should give this credibility finding 'great deference.' 476 U.S. at 98 n.21.

Garrison, slip opinion at 5-6.

In the present case the trial judge, who conducted the *Batson* inquiry, was the same judge who had tried the

Tindle case. He had conducted the voir dire examination of the prospective jurors and had observed the selection process. He stated that he had reread the transcript of the entire voir dire proceedings and found:

> there is no indication or even a hint from any of the questions requested by the government or otherwise of any intent by government counsel to discriminate in the jury selection process. It should further be noted that the government (as well as the defendants) exercised its strikes from the jury list itself and even out of the presence of the jury. It is therefore understandable in this case while there was some uncertainty in the mind of government counsel concerning the race of some of the prospective jurors.

Joint Appendix at page 133.

The trial judge found that there was no reason shown in the present case for an evidentiary hearing. The defendant had indicated that he would like to call as witnesses the two prosecutors, Lt. Merritt, the defendant himself, one of the defense counsel, co-defendant David Hughes and several other witnesses, who were alleged to have been present during the voir dire proceedings. The trial court decided that such an extended hearing was not necessary and that the matter could be decided upon the record because it was sufficient to decide the issue presented. The court stated that it would give little credibility to the Hughes affidavit, and we can certainly understand this. The court also indicated that any testimony by the defendant would be considered in the light of prior proceedings. At sentencing the court advised Tindle:

> I would further note that you testified at the trial. I can say to you, Mr. Tindle, that I have seldom heard more untruthful testimony presented under oath in this Courtroom than what I heard during your testimony. The jury did not believe you and

> neither did I. This is a proper consideration, in deciding upon an appropriate sentence in this case, since you sought to affect the administration of justice by false testimony.

Joint Appendix at page 140.

There was no abuse of discretion in the district court's refusal to conduct an evidentiary hearing in this case. *Batson* does not require a trial within a trial, and purposely left to lower courts the method of conducting inquiries into *Batson*-type claims.

IV

Appellant contends that the district court erred in refusing to produce and allow his attorneys to examine the material submitted by the United States Attorney to the district court *in camera*. The district court made the following statement regarding its use of the *in camera* material:

> Finally, the *in camera* submission of the government fully supports its contention that its reasons for exercising the strikes in question were not pretextual. This submission includes, *inter alia*, a copy of the jury list used by government counsel with contemporary notes made by the prosecutors alongside each of the jurors listed. Close examination of these notes reveals that the reasons given by government counsel for these strikes were not pretextual. The notations made contemporaneously with the exercise of the strikes in question fully support the explanations given by government counsel for exercising these peremptory strikes.

Joint Appendix at page 133.

At the hearing the district court indicated that it would decide whether to give the defendant access to the *in camera* material. In its order it decided against access and stated:

> In this particular case, the *in camera* submission made by the government included extremely sensitive matters as well as work product materials of the government attorneys. Portions of the sensitive materials submitted relate to threats and attempted intimidation fostered by defendant Tindle himself. Other portions relate to notes made by government counsel on the jury list itself which reveals strategy employed by government counsel during the trial of the case. Were the court to permit counsel for defendant to have access to the *in camera* submission and were a new trial to be then ordered, defendant would have access to materials to which he would not otherwise be entitled either under Rule 16, F. R. Crim. P., or under the Jencks Act.

Joint Appendix at pages 137-38.

We have reviewed the materials submitted *in camera* and we agree with the district court's conclusion that this material should not be delivered to defense counsel. We faced this same claim in *Garrison*, *supra*, and stated:

> We conclude that the district court's *ex parte* examination of the prosecutor's notes does not warrant reversal. The Supreme Court in *Batson* expressly refrained from fashioning a procedure to be followed by the trial court in making its determination. 476 U.S. at 99-100 n.24. The Sixth Circuit has approved *ex parte* submission of explanations by the government once the defendant has made out a *prima facie* case of discriminatory use of peremptory challenges. *United States v. Davis*, 809 F.2d 1194 (6th Cir. 1987). We, however, agree with the Ninth Circuit that the important rights guaranteed by *Batson* deserve the full protection of the adversarial process except where compelling reasons requiring secrecy are shown. *United States v. Thompson*, 827 F.2d 1254, 1258-59 (9th Cir. 1987). Like that circuit, we recognize that instances may arise in which

to reveal the grounds for striking a juror would unduly prejudice the government. For example, an *ex parte* hearing may be necessary if by coincidence the government is conducting an undercover investigation of the juror's likely involvement in other crimes. But the government must make a substantial showing of necessity to justify excluding the defendant from this important stage of the prosecution. *Thompson*, 827 F.2d at 1258.

Confronted by a similar situation—an *ex parte* consideration of the prosecutor's explanation—the Seventh Circuit concluded that the procedure 'passed constitutional muster.' Nevertheless, Chief Judge Bauer, writing for the court, cautioned:

> [W]e believe that adversarial hearings are the appropriate method for handling most *Batson*-type disputes. In this case, for example, we believe that the prosecution could have explained its reasons for excluding the four black venire persons in open court. Thus, while we hold that it is up to the trial judge to decide what procedure is best-suited for a particular case, we trust that the trial judge will utilize an adversarial procedure whenever possible.

United States v. Tucker, 836 F.2d 334, 340 (7th Cir. 1988).

Garrison, slip opinion at 6-7.

In the Tindle case the prosecutors explained most of their reasons for exercising their peremptory challenges in open court, and we find that the district judge did not err in allowing some of the reasons to be supported by the materials submitted *in camera*. Compelling reasons for the use of this procedure were clearly present in this case.

The judgment of the district court is affirmed.

AFFIRMED.

MURNAGHAN, Circuit Judge, concurring in part and dissenting in part:

Protecting an individual's constitutional right to a fair trial is a solemn responsibility of the federal courts. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Supreme Court ruled that the government's privilege to strike individual jurors through peremptory challenges is limited by the Equal Protection Clause, and that the government violates equal protection guarantees if it challenges potential jurors solely on account of their race. *Id.* at 89. A *Batson* violation obviously harms the defendant, who has "the right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria." *Id.* at 85-86. The defendant is not the only one with vital interests at stake, however. The Court noted in *Batson* that such violations also harm improperly excluded jurors and touch the entire community by "undermin[ing] public confidence in the fairness of our system of justice." *Id.* at 87. Mindful of the responsibility we carry, and mindful of the fact that the American justice system itself is on trial when a *Batson* challenge is raised, I am constrained to dissent in part in the present case.

I agree with the majority that the district judge acted within his discretion in declining to afford Tindle an evidentiary hearing. While I think it is important to stress that proposed *in camera, ex parte* submissions to support the government's rebuttal should be carefully scrutinized by the courts and permitted only in limited circumstances, I also agree with the majority that most of the *in camera* material in the present case was treated appropriately by the district court.

I disagree with the majority on two points, however. First, I believe that the jury list as augmented with the prosecutor's notes during voir dire should have been made available to Tindle, with court-approved redac-

tions where appropriate. Second, and more important, I believe the district court's finding that the government carried its burden of providing a non-pretextual, neutral explanation was clearly erroneous as to two of the five black jurors who were struck with peremptory challenges. I would therefore reverse and remand for a new trial.

I.

In *United States v. Garrison*, 849 F.2d 103 (4th Cir. 1988), we noted that "the important rights guaranteed by *Batson* deserve the full protection of the adversarial process except where compelling reasons requiring secrecy are shown." *Id.* at 106 (citing *United States v. Thompson*, 827 F.2d 1254, 1258-59 (9th Cir. 1987)). We also stated clearly in *Garrison* that "the government must make a substantial showing of necessity to justify excluding the defendant from this important stage of the prosecution." *Id.* In my opinion, such a showing has not been made with respect to the jury list containing the prosecutor's notes.

The district court concluded that *ex parte*, *in camera* submission was appropriate because the annotated jury list

> reveal[s] strategy employed by government counsel during the trial of the case. Were the Court to permit counsel for defendant to have access to the *in camera* submission and were a new trial to be then ordered, defendant would have access to materials to which he would not otherwise be entitled either under Rule 16, F.R. Crim. P., or under the Jencks Act.

United States v. Tindle, No. H-83-00154, slip op. at 18-19 (D. Md. June 2, 1987) (Harvey, C.J.). In its Brief to this Court, the government also argues that it should not be required to disclose its "work product" to the defendant. These statements have no bearing on the present inquiry. I have no doubt that a defendant's

request for the prosecutor's annotated jury list as part of *discovery* would properly be denied on all three grounds raised by the government. However, here the government, facing the defendant's *prima facie* case of discriminatory jury selection under *Batson*, has *chosen* to use the annotated jury list as evidence to support the government's articulated neutral explanations for its juror challenges. Any "work product" claims are therefore inapposite, and the requirements of Rule 16 and the Jencks Act need not be met. As for the district court's concern about revealing prosecutorial strategy, that can hardly be of concern where, as here, *Batson* is being applied retroactively after the completion of the trial at issue.

If any specific notations on the list warrant confidentiality, such as for example a notation that might embarrass a potential juror or pertain to an ongoing unrelated investigation, the district court could easily accommodate all competing concerns through careful redaction. Limited, court-supervised redaction would protect legitimate concerns of the prosecutors while also preserving the vital adversarial aspect of the *Batson*-type challenge.

Where *ex parte, in camera* submission is indeed necessary for some reason, obviously the excluded party must rely on the judge to give full and fair consideration to the evidence and to relevant legal and factual issues. But in our adversarial system, we ordinarily go to great lengths to ensure that both sides have an equal opportunity to argue all points and all evidence before a judge reaches his decision, and to ensure that such proceedings are open to the public. I see no reason to stray from the usual principles in the present contest. Indeed, I would argue that openness and candor are even more important in a *Batson*-type controversy than in most other situations. Anyone denied access to purportedly exonerating materials cannot help suspecting the worst—the best in-

tentions of government counsel and the district court notwithstanding—it is simply human nature to be suspicious when relevant data is withheld by a decision-maker.

The district judge specifically mentioned the *in camera* submission of the annotated jury list and concluded that "[c]lose examination of these notes reveals that the reasons given by government counsel for these strikes were not pretextual. The notations made contemporaneously with the exercise of the strikes in question fully support the explanations given by government counsel for exercising these peremptory strikes." *United States v. Tindle*, No. H-83-00154, slip op. at 14 (D. Md. June 2, 1987). To the extent that the jury list supports the government's assertions, its release would be reassuring to any who suspected improper conduct by the prosecution and would foster public confidence in the system. *See Batson*, 476 U.S. at 87 ("Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."). I therefore think the district court acted improperly in denying the defendant access to the annotated jury notes, and would order their release following appropriate redactions by the district court.

II.

My chief disagreement with the majority opinion is with its endorsement of the district court's finding that the prosecution rebutted Tindle's *prima facie* case with neutral and non-pretextual explanations for each peremptory challenge at issue. In *Batson*, the Supreme Court ruled than once a *prima facie* case is established, "the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." 476 U.S. at 97. A court's failure to undertake a serious examination of prosecutors' explanations makes the government's burden illusory. Because I believe the district court's

finding was clearly erroneous as to two of the challenges, I would reverse and grant a new trial.

The government explained that black potential juror Granderson was struck because of the resemblance between her name and "Grandison," the surname of the defendant in an unrelated case also prosecuted by Assistant United States Attorney Cobb.[1] The explanation is so flimsy that it cannot be held to survive a serious pretext inquiry. Grandison was in no way involved in the present case, and neither was his connection with Cobb. Ms. Granderson would not herself have been at issue in the case; jurors are not addressed by name during trials, so there could be no grounds for concern that others might hear her name and be confused. The difference in spelling indicates lack of any relationship, not the reverse. If the pretext inquiry is to be at all meaningful, the government's explanation of the Granderson strike simply cannot be accepted.

The government's lame explanation for its peremptory challenge of prospective juror Johnson is not much better. The district court summarized the government's explanation as follows:

> Juror Johnson was listed as being 30 years of age and a construction laborer who resided in Belts-

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[1] A concern about potential juror Granderson being kin to Anthony Grandison, a man whose peculiar view of civic obligation is well know to this Court, *see United States v. Grandison*, 780 F.2d 425 (4th Cir. 1985), would be wholly legitimate. It might form a reason to strike Mrs. Granderson, however, that reason was not advanced. Even if it was advanced, I am not persuaded that it would be sufficient justification in itself. The manner to allay that concern is by *voir dire*, then if kinship is found a strike could be made. It does not appear that a question regarding kinship was made of Granderson during *voir dire*. Since Grandison was black, 780 F.2d at 430-31; Brief for Appellants at 32, *United States v. Grandison*, 780 F.2d 425 (4th Cir. 1985) (No. 84-5007(L)), and Granderson was black also, blackness stands as the reason for the strike.

> ville, Maryland. According to the government, when this juror was struck, the prosecutors were unaware whether he was black or white. The master jury list for the September Term 1983 indicated that juror Johnson was unemployed while the jury list used at trial indicated that he was employed as a construction laborer. Although government counsel have no clear recollection of this particular juror, they believe he was struck because it was thought that he was not regularly employed. It was further believed that at times when he was employed, he worked at a location in Prince George's County which was near an area where the Tindle narcotics operation was conducted.

United States v. Tindle, No. H-83-00154, slip op. at 9-10 (D. Md. June 2, 1987). While it may be true, the government's assertions that the prosecutors were unaware of whether Johnson was black or white, and that race did not enter into the decision to challenge, cannot simply be blindly accepted by this Court as true. *See Batson*, 476 U.S. at 98 ("Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections.'") (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

The prosecutors' assertion that they did not remember what Johnson looked like is seriously undermined by their simultaneous assertion that another black potential juror was properly struck because he was of the same size and appearance as a co-defendant who was planning to raise an issue of identification accuracy at trial. Once a *prima facie* case under *Batson* has been made out, it does not require a particularly suspicious mind to conclude that a prosecutor's selective memory about the racial characteristics of potential jurors cannot be countenanced.

The government's explanation as to Johnson's place of employment is also not supported by an contemporaneous evidence. The government does not point to any evidence that would justify the prosecutors' claimed belief at the time of voir dire that Johnson worked at a location near Tindle's narcotics operations. The government thus is again asking this Court blindly to accept its affirmation of good faith, something *Batson* forbids us to do.

The government admittedly faces a difficult task when asked to reconstruct, several years later, most of its reasons for challenging prospective jurors. This is particularly true in the case of peremptory challenges, which ordinarily do not require any explanation or justification. I also acknowledge that *Batson* was decided nearly three years after the trial in the present case. Yet, to most of us, racial characteristics, white or black, are readily apparent and usually remembered. As the government acknowledges in its Brief to this court, the prosecutors in the present case were already required at the time of trial, as a matter of office policy, to be prepared to articulate "satisfactory grounds" for the exercise of a peremptory strike "particularly where a respective juror is a member of a group against which, for equal protection purposes, discrimination will be deemed to be 'suspect'." Appellee's Brief at 5, *quoting* 1983 Office Policy Manual, United States Attorney's Office for the District of Maryland.

While I have a strong inclination to believe in the good faith asserted by the prosecutors, my reading of *Batson* compels me to reach the conclusion that the government has failed to carry its burden of rebutting Tindle's *prima facie* case with neutral and non-pretextual explanations for the peremptory challenges of potential jurors Granderson and Johnson. If the explanations offered for those strikes are deemed adequate, the burden explicitly assigned to the government by the Supreme Court in *Batson* becomes totally illusory.

I therefore dissent in part.

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

No. 84-5036

UNITED STATES OF AMERICA,
Appellee,

v.

ISAAC JAMES TINDLE, a/k/a I.J.,
Appellant.

Argued Aug. 14, 1985

Decided Dec. 29, 1986

Henry W. Asbill (Timothy D. Junkin; Asbill, Junkin & Myers, Chtd., on brief), for appellant.

Ty Cobb, Asst. U.S. Atty. (J. Frederick Motz, U.S. Atty., Donna H. Triptow, Asst. U.S. Atty., on brief), for appellee.

Before MURNAGHAN and CHAPMAN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

MURNAGHAN, Circuit Judge:

This case was held in abeyance pending the Supreme Court's decision in *Batson v. Kentucky*, —— U.S. ——, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In view of the Supreme Court's recent decision in that case, we remand for the district court to ascertain whether blacks were systematically excluded from the jury in violation of the Equal Protection Clause through the government's use of its peremptory challenges. Since there may be a retrial depending on the district court's finding and since a number of other issues were raised we express our view respecting them to promote a final and definitive resolution of this case.

I

Isaac James Tindle appeals his conviction for heroin related offenses. On April 20, 1983, Tindle was indicted with thirteen other individuals in the United States District Court for the District of Maryland. Tindle was charged with 1) conspiracy to possess and distribute heroin (21 U.S.C. § 846); 2) actual distribution of heroin on June 8, 1982, September 15, 1982, September 30, 1982, and November 17, 1982 (21 U.S.C. § 841(a), 18 U.S.C. § 2); and 3) unlawful use of a communications facility (a telephone) in furtherance of the conspiracy (21 U.S.C. § 843(b), 18 U.S.C. § 2). At his arraignment on April 26, 1983, Tindle pled not guilty to all charges. He was ordered held on a twenty million dollar surety bond.

On June 22, 1983, Tindle was charged, in a separate indictment, with conducting a continuing criminal enterprise in violation of 21 U.S.C. § 848. He was arraigned on June 30, 1983 and, again, pled not guilty.[1] Pursuant to the government's motion, the two indictments were ordered joined for trial. Tindle was tried alone (the other twelve co-defendants were either fugitives, had pled guilty, or had been severed). The trial began on October 11, 1983. On November 10, 1983, the jury found Tindle guilty of all counts in the original indictment. He was acquitted of the continuing criminal enterprise charge contained in the second indictment.

On January 5, 1984, Tindle was sentenced to an aggregate prison term of fifty years. Judge Harvey also imposed a ten year Special Parole Term and a $150,000 fine.

II

In 1971, Tindle was convicted of selling heroin. After his release from prison in 1976 through April 1983 (when he was indicted), Tindle allegedly acquired a

[1] On June 30, 1983, at the conclusion of a bond reduction hearing, the district court reduced Tindle's bond to four million dollars.

fortune selling heroin in Washington, D.C. Tindle's drug operation was highly sophisticated and extensive. It was also marked by widespread violence.

The documentary and financial evidence admitted at trial established that Tindle had a lavish lifestyle presumably made possible by his involvement with heroin. The government demonstrated that in 1977, following his release from prison, Tindle spent $18,878.05. In 1978, the evidence revealed that Tindle spent $79,183.04. The figure for 1979 was $155,863.56 and in 1980, 1981, and 1982 he spent $365,909.74, $438,867.07, and $282,825.36, respectively. The government further informed the jury that a search of Tindle's home revealed jewelry, furs, expensive furnishings, multiple sky lights and fireplaces, and other trappings of wealth.

To substantiate its contention that Tindle's flamboyant lifestyle stemmed from his heroin operation, the government introduced, *inter alia*, "narcotics debt sheets" found in Tindle's basement fireplace which purported to list numerous high-priced drug transactions. The government also admitted large quantities of cutting material, various drug paraphernalia and two handguns found in the home of one of Tindle's lady friends. In addition, the jury learned that searches of the residences of Tindle's principal associates uncovered additional narcotics debt sheets, weapons, and bulletproof vests.

The government then sought to establish that Tindle, with the assistance of his attorney, Herbert Suskind, attempted to secret his drug-generated income by engaging in "under the table" payments in connection with certain real estate transactions, reporting substantial gambling income on his tax returns, and securing discarded racetrack tickets in an effort to support his gambling claims. Tindle also allegedly lent money, using Suskind as an intermediary, to an independent businessman who repaid Tindle with cash and created fraudulent W-2 income

forms for 1980-81. The forms stated that Tindle earned his living as a gas station attendant.

III

We will address Tindle's assignments of error seriatim. Tindle first contends that the district court committed reversible error in refusing to require the government to copy and release to the defense counsel all of the business and financial records of Tindle in its possession. Tindle claims that he was entitled to said records pursuant to Fed.R.Crim.P. 16(a)(1)(A).[2] In a related argument, Tindle contends that the district court committed reversible error by refusing to grant a ninety day continuance; the one week continuance permitted allegedly rendered it impossible for defense counsel to pore over the documents and fully prepare himself for trial.

The appellant moved the court to order the government to copy and release all of Tindle's financial records in the government's possession. The appellant offered to bear the reproduction costs. The government claimed that it had already delivered thousands of documents to Tindle

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[2] Rule 16. Discovery and Inspection

(a) Disclosure of Evidence by the Government.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged.

and that it would be unwieldy and fruitless to copy all of the other documents requested. The government asserted that it had already reviewed the materials and had determined that they did not contain any exculpatory information. The government suggested, however, that if Tindle or his attorney deemed any documents relevant, the government would furnish them with copies. On August 19, 1983, the district court denied Tindle's motion and ruled that Tindle, his lawyer and either Suskind or Hughes (Tindle's real estate partner and advisor) could view the financial documents in the prosecutor's office. Mrs. Tindle was not permitted in the room with her husband. The district court further ruled that Tindle should be supplied with copies of documents he or his attorney determined were helpful to his defense.

In September, Tindle again moved the court to order the government to copy and release all of the business records and/or to grant a ninety day continuance to allow defense counsel to review said records. The district court did not order the copying and release of all documents, but it did modify its August order in the appellant's favor. The district court ruled that Mrs. Tindle would now be able to peruse the documents in the same room (at the same time) as her husband and that DEA agents should not be permitted in the room while Tindle and his entourage were viewing the documents; only U.S. Marshals were permitted in the conference room. The district court also granted the appellant an eight day continuance to enable his counsel further to prepare for trial.

The district court's ruling were reasonable under the circumstances. Although he did not order the government to copy the documents (at the appellant's expense), he permitted the appellant to have access to all of the records and to copy those he deemed relevant. The district court took note of the fact that between its August and September orders, Tindle did not take many trips

to examine the documents and did not have many copies made. The district court appears to have viewed the infrequent trips as an indication that the documents would not greatly aid Tindle's defense and that defense counsel was simply asserting a need for the entire mountain of documents as a dilatory tactic.

Not only did Tindle's apparent lack of interest in the documents (as evidenced by the few trips to the prosecutor's office) influence the court to refuse Tindle's request for copies of the thousands of records but it also apparently influenced the district court to disallow a continuance for longer than eight days. In other words, the district court presumably regarded the appellant's plea for more preparation time with skepticism since the defense counsel had failed to make effective use of the discovery time already granted.

In sum, in light of the fact that defense counsel failed to take full advantage of his ability to review and copy documents that would perhaps have aided his client, the district court did not abuse its discretion with regard to the discovery matters and the continuance.[3] *See* Fed.R. Crim.P. 16(d)(1). *See also United States v. Sellers*, 658 F.2d 230, 231 (4th Cir.1981) ("Only when a court's refusal to grant a motion for a continuance can be deemed arbitrary and fundamentally unfair will such a refusal be deemed an abuse of discretion.").

Tindle next asserts that the government did not in its plea agreement entered with Suskind require Suskind

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[3] In another somewhat related argument, Tindle contends that he was denied the effective assistance of counsel because his attorney was forced to try the case before he was fully prepared. Given Tindle's attorney's success in securing Tindle's acquittal of the more serious charge ("continuing criminal enterprise") and given his attorney's infrequent trips to the prosecutor's document room (the suggestion being that he was not *forced* to try the case in an unprepared fashion but rather strategically chose to spend his time on more fruitful witnesses/witnesses/exhibits), the court repects his ineffective assistance of counsel argument.

to testify at trial solely as a device to preclude Suskind's use as a witness for the defense. Tindle additionally claims that the government acted improperly in refusing to grant Suskind use immunity since such failure resulted in the suppression of exculpatory evidence. Tindle further asserts that the government requested the district court to postpone the sentencing of Suskind until after Tindle's trial in order to intimidate Suskind and render him unavailable as a witness.

A. *The Plea Agreement and the Timing of Suskind's Sentencing*

Although Tindle endeavors to create a very dramatic scenario in which the government and district court scheme to keep Suskind out of the defense's reach, his attempts fail in light of existing facts. The government did not persaude or coax Suskind not to testify for Tindle nor did it omit a requirement that Suskind testify at trial in the plea agreement in order to hamper the defense. Rather, Suskind, fearing for his life and that of his wife, children, and father, told the government, during plea negotiations, that he adamantly refused to testify at trial. The government, faced with an unyielding Suskind, took what it could get to obtain a conviction without the necessity of a full-blown trial. It did succeed in conditioning Suskind's plea agreement on cooperation before the grand jury.

Likewise, the district court acted properly in postponing Suskind's sentencing until after Tindle's trial. Tindle states that the sentencing was delayed in order to send Suskind "the powerful message that if he did take the stand, and if his testimony was disbelieved by the court it would cost the witness dearly at a later time (*i.e.* sentencing)." However, the district court was simply deferring sentencing until it could assess the full extent of Suskind's truthfulness and cooperation with the government. *Cf. United States v. Grayson*, 438 U.S. 41, 50-51,

98 S.Ct. 2610, 2615-2616, 57 L.Ed.2d 582 (1978) ("A defendant's truthfulness or mendacity while testifying on his own behalf [may be considered probative of defendant's] prospects for rehabilitation and hence relevant to sentencing."). Arguably, postponing sentencing until after Tindle's trial could have encouraged (instead of discouraged) Suskind to testify since, if Suskind testified truthfully, his honesty would have perhaps resulted in a more lenient sentence. The truthfulness would be present whether the testimony favored the government or the defendant. Th district judge, a neutral adjudicator interposed between conflicting parties is interested in the quality of the testimony not in whether it favors one party or the other. We refuse to accept the premise implicit in Tindle's position that Suskind should have been allowed indeed propelled, if not compelled, to testify *falsely* without worrying about repercussions at the time of sentencing.

B. *Suskind's Fifth Amendment Privilege*

On November 1, 1983, Tindle called Suskind as a witness for the defense. Suskind invoked his fifth amendment privilege and refused to testify. After conducting a hearing on the issue, the district court ruled that Suskind's claim of privilege was valid, and refused to compel his testimony. The appellant contends that the district court's ruling was improper because Suskind had already pled guilty to the charges levelled against him and because there was no longer any legitimate threat of further prosecution.

The appellant's argument must fail since it cannot be unequivocally stated that Suskind did not have legitimate fears of incurring additional criminal liability as a result of his varied and sordid business transactions with Tindle and other individuals. *See United States v. Pardo*, 636 F.2d 535, 544 (D.C.Cir.1980) ("[A] witness does not lose his Fifth Amendment right to refuse to testify con-

cerning *other* matters or transactions not included in his conviction or plea arrangement."). *See also United States v. Trejo-Zambrano*, 582 F.2d 460, 464 (9th Cir. 1978), *cert. denied*, 439 U.S. 1005, 99 S.Ct. 618, 58 L.Ed. 2d 682 (1978) (potential defense witness convicted, *but not yet sentenced*, could validly assert fifth amendment privilege since "from the record one cannot say that [the potential witness] did not legitimately fear incurring additional criminal liability from any testimony he could give on behalf of [a co-defendant]"); *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951) (Fifth Amendment privilege against self-incrimination is "confined to instances where witness has reasonable cause to apprehend danger from a direct answer."). Also, Suskind could have properly asserted his fifth amendment privilege if Suskind's testimony at trial were to reveal that he had perjured himself during his grand jury testimony. *See United States v. Partin*, 552 F.2d 621, 632 (5th Cir.1977), *cert. denied*, 434 U.S. 903, 98 S.Ct. 298, 54 L.Ed.2d 189 (1977) ("[A] witness may not claim the privilege out of fear that he will be prosecuted for perjury for what he is about to say, although he may claim the privilege if his new testimony might suggest that he had perjured himself in testifying on the same subject at a prior proceeding."). The plea agreement between the government and Suskind specifically provided that nothing in the agreement would be construed to protect Suskind in any way from prosecution for perjury.

Thus, we conclude that the district court correctly ruled that Suskind could validly refuse to testify.

C. *Immunity*

The appellant acknowledges that the government has exclusive statutory authority to grant use immunity to a potential witness. *See* 18 U.S.C. § 6003; *see also United States v. Karas*, 624 F.2d 500, 505 (4th Cir.

1980), *cert. denied*, 449 U.S. 1078, 101 S.Ct. 857, 66 L.Ed.2d 800 (1981) (The district court has no authority to confer immunity *sua sponte*); *United States v. Klauber*, 611 F.2d 512, 517 (4th Cir.1979), *cert. denied*, 446 U.S. 908, 100 S.Ct. 1835, 64 L.Ed.2d 261 (1980); *United States v. Rocco*, 587 F.2d 144, 147 (3d Cir.1978), *cert. denied*, 440 U.S. 972, 99 S.Ct. 1537, 59 L.Ed.2d 789 (1979) ("[I]t has been uniformly accepted that the grant or denial of immunity is within the sole discretion of the executive branch of government and that neither the courts nor defense counsel may force the prosecutor to compel the testimony of a defense witness."). However, the appellant contends that the district court committed error in the instant case by failing to invoke its inherent authority to dispense immunity to Suskind. The appellant claims that district courts have exercised such authority when it has been necessary to safeguard a defendant's right to essential exculpatory information, when the prosecutor one-sidedly immunizes certain witnesses who testify for the government but refuses to grant reciprocal immunity to other witnesses who might give helpful testimony for the defendant, and when the prosecutor by threats or other misconduct intimidates a defense witness into refusing to testify. *See, e.g., Government of Virgin Islands v. Smith*, 615 F.2d 964, 968-69 (3d Cir.1980);[4] *Earl v. United States*, 361 F.2d 531, 534 n. 1 (D.C.Cir.1966), *cert. denied*, 388 U.S. 921, 87 S.Ct. 2121, 18 L.Ed.2d 1370 (1967).

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[4] The holding in *Government of Virgin Islands v. Smith* has been soundly criticized on a number of grounds and is clearly the minority view among courts which have considered the issue. *Mattheson v. King*, 751 F.2d 1432 (5th Cir. 1985), *cert. dismissed*, —— U.S. ——, 106 S.Ct. 1798, 90 L.Ed.2d 343 (1986); *United States v. Pennell*, 737 F.2d 521, 527 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158, 105 S.Ct. 906, 83 L.Ed.2d 921 (1985); *United States v. Hunter*, 672 F.2d 815 (10th Cir. 1982); *United States v. Thevis*, 665 F.2d 616, 639 (5th Cir. 1982), *cert. denied*, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982).

Tindle, however, has not only failed to make a decisive showing that he has been the victim of prosecutorial misconduct or overreaching, but he has also failed to demonstrate that Suskind would have supplied evidence clearly 1) material, 2) exculpatory, and 3) unavailable from any other source (such as his accountant, real estate partner, or wife). In light of Tindle's weak showing, and in light of the generally accepted view that a defendant has no right to defense witness immunity,[5]

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[5] *See Thompson v. Garrison*, 516 F.2d 986, 988 (4th Cir. 1975), *cert. denied*, 423 U.S. 933, 96 S.Ct. 287, 46 L.Ed.2d 263 (1975):

> Thompson's insistence that the district judge should have guaranteed Sings immunity and compelled him to testify by invoking 18 U.S.C. § 6002 is based on a misconception of the law. A district judge is not authorized to initiate immunity. The statute places this responsibility on the United States Attorney, who can act only after receiving approval from the Attorney General, his deputy or an assistant. 18 U.S.C. § 6003. The function of the district court is limited to determining whether the government's request for immunity complies with the statutory procedure.

See also United States v. Turkish, 623 F.2d 769, 773-74, 777-78 (2d Cir. 1980), *cert. denied*, 449 U.S. 1077, 101 S.Ct. 856, 66 L.Ed.2d 800 (1981):

> The established content of the Sixth Amendment does not support a claim for defense witness immunity. Traditionally, the Sixth Amendment's Compulsory Process Clause gives the defendant the right to bring his witness to court and have the witness's non-privileged testimony heard, but does not carry with it the additional right to displace a proper claim of privilege, including the privilege against self-incrimination. . . .
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> . . . . [Also], [w]ithout precluding the possibility of some circumstances not now anticipated, we simply do not find in the Due Process Clause a general requirement that defense witness immunity must be ordered whenever it seems fair to grant it. The essential fairness required by the Fifth Amendment guards the defendant against overreaching by the prosecutor . . . . It does not create general obligations for prosecutors or courts to obtain evidence protected by lawful privileges.
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> . . . . In fact, we think trial judges should summarily reject claims for defense witness immunity whenever the witness for

we conclude that the district court did not err in refusing to grant use immunity to Suskind. After a close examination of the record, the court is convinced that Tindle made unsubstantiated allegations and used hyperbolic language when describing the government's conduct and the materiality and exculpatory nature of Suskind's supposed testimony.

We next consider Tindle's contention that the district court abused its discretion in disallowing Tindle to call an undercover DEA agent as a witness. DEA Special Agent Kenneth Feldman, acting in an undercover capacity, had posed as a drug dealer seeking Herbert Suskind's assistance in laundering drug proceeds. On one occasion, government officers videotaped an undercover meeting between Feldman, an IRS agent, Herbert Suskind, and his accountant brother, David. Tindle sought to introduce the videotape through Feldman.

Tindle's attorney proffered that Feldman would testify that Suskind discussed Tindle's criminal activity without Tindle's permission, that the government was trying to entrap Tindle in criminal activity through Suskind, and that Tindle rejected opportunities to engage in drug deals with Feldman when Suskind offered them. After hearing Tindle's proffer, the district court determined that Feldman's testimony and the videotape, even perhaps relevant, were cumulative and thus excludable pursuant to FRE 403. That is, even assuming that Suskind's taped comments to Feldman, boasting about his

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whom immunity is sought is an actual or potential target of prosecution. No hearing should be held to establish such status. The prosecutor need only show that the witness has been indicted or present to the court *in camera* an *ex parte* affidavit setting forth the circumstances that support the prosecutor's suspicion of the witness's criminal activity. No duty is imposed upon the prosecutor; he simply has an option to rely upon the witness's status as an actual or potential target of prosecution to foreclose any inquiry concerning immunity for that witness.

ability to launder Tindle's narcotics proceeds, were arguably relevant to Tindle's entrapment defense, evidence of that nature had already been placed before the jury by David Suskind.

A trial judge has broad discretion to choreograph a trial. In the instant case, it cannot be said that the district court abused its discretion in disallowing Feldman's taking the stand and needlessly presenting cumulative evidence.[6] Also, as an additional point even had it been error, it was nevertheless arguably harmless since the proffered testimony bore on an "entrapment defense" —a defense that strained belief when viewed against a backdrop of all the other evidence in the record.[7]

Tindle next claims that the district court admitted statements by co-conspirators, Herbert Suskind, Ronald Washington, Carl Kelly and Mary Tindle pursuant to Fed.R.Evid. 801(d)(2)(E) in violation of his sixth amendment right to confront the witnesses against him. Tindle asserts that the violation resulted from the fact that the government never proved the unavailability of the various declarants. *See Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) (Supreme Court placed two restrictions on use of hearsay evidence

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[6] *See United States v. Heyward*, 729 F.2d 297, 301 n. 2 (4th Cir. 1984), *cert. denied*, 469 U.S. 1105, 105 S.Ct. 776, 83 L.Ed.2d 772 (1985) ("The trial court has wide discretion [in ruling on admissibility pursuant to 403] and its determination will not be overturned except under the most 'extraordinary' of circumstances."); *United States v. Juarez*, 561 F.2d 65, 71 (7th Cir. 1977) ("[T]rial judges are much closer to the pulse of a trial than [the appellate judges] can ever be and [thus] 'broad discretion' is necessarily accorded them in [ruling on admissibility pursuant to Rule 403].").

[7] *See United States v. Michaels*, 726 F.2d 1307, 1315 (8th Cir. 1984), *cert. denied*, 469 U.S. 820, 105 S.Ct. 92, 83 L.Ed.2d 38 (1984) ("A district court's determination respecting the admissibility of evidence under Rule 403 is paid great deference and its determination will not be reversed on appeal 'absent a clear *and prejudicial* abuse of discretion.'" (emphasis added)).

in criminal trials: *prosecutor must establish that declarant is unavailable*[8] and statement may be admitted only if it bears adequate indicia of reliability).[9]

The prosecution sufficiently proved that the declarants were unavailable at trial. Suskind invoked his fifth amendment privilege while Washington indicated that he would invoke his privilege if called to testify. Kelly refused to testify after being called to the stand, indicating his desire to follow his attorney's advice. *See Holt v. Wyrick*, 649 F.2d 543, 548 (8th Cir.1981), *cert. denied*,

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[8] More recently, in *United States v. Inadi*, —— U.S. ——, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986), the Supreme Court restricted the requirement of unavailability established in *Roberts* to the facts of the *Roberts* case. *Roberts*, said the *Inadi* court, held that unavailability is required only when prior testimony is sought to be introduced. In *Inadi* the Court permitted the introduction of the out-of-court statements of co-conspirators though the declarants were available. Thus, even had the hearsay declarants in this case been available as witnesses, their statements could have been introduced under *Inadi* without infringing on defendant's Sixth Amendment rights.

[9] The Supreme Court in *Ohio v. Roberts* further ruled that "reliability [could] be inferred without more in a case where the evidence [fell] within a firmly rooted hearsay exception." *Ohio v. Roberts, supra*, 448 U.S. at 66, 100 S.Ct. at 2539. In *United States v. Siripan*, 771 F.2d 840, 845-46 (4th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 863, 88 L.Ed.2d 901 (1986), the court ruled that the co-conspirator exception to the hearsay rule, contained in Fed.R.Evid. 801(d)(2)(E), constituted a "firmly rooted hearsay exception" so that reliability need not be independently established. *United States v. Siripan* harmonizes with the position of the First, Fifth, and Seventh Circuits, *i.e.*, that statements admitted pursuant to Fed.R.Evid. 801(d)(2)(E) are presumptively reliable and therefore do not offend the confrontation clause. *Ottomano v. United States*, 468 F.2d 269, 273 (1st Cir. 1972), *cert. denied*, 409 U.S. 1128, 93 S.Ct. 948, 35 L.Ed.2d 260 (1973); *United States v. Peacock*, 654 F.2d 339, 349-50 (5th Cir. 1981), *cert. denied*, 464 U.S. 965, 105 S.Ct. 404, 78 L.Ed.2d 344 (1983); *United States v. Xheka*, 704 F.2d 974, 987 n. 7 (7th Cir. 1983), *cert. denied*, 464 U.S. 993, 104 S.Ct. 486, 78 L.Ed.2d 682 (1983); *United States v. Papia*, 560 F.2d 827, 836 n. 3 (7th Cir. 1977).

454 U.S. 1143, 102 S.Ct. 1002, 71 L.Ed.2d 295 (1982) (Witness rendered "unavailable" at trial after she exercised her fifth amendment privilege against self-incrimination and refused to testify); *cf. United States v. Elmore*, 423 F.2d 775, 778 (4th Cir.1970), *cert. denied*, 400 U.S. 825, 91 S.Ct. 49, 27 L.Ed.2d 54 (1970). Mary Tindle, it seems safe to say, would have invoked her spousal privilege and would have thus rendered herself "unavailable" for trial. In fact, the appellant proved in his own case the unavailability of three of the four alleged co-conspirators; the fourth was his wife who arguably was more available to Tindle than to the government.

Thus, we conclude that Tindle's sixth amendment argument based on the admission of co-conspirators' statements lacks merit.

Next, we consider Tindle's assertion that he was improperly limited in cross-examining John Shelton, a key government witness. Shelton entered a plea agreement with the government whereby the government agreed that is would "not prosecute Mr. Shelton for his heroin related activities in [the District of Columbia]" in return for Shelton's full cooperation in the prosecution of Tindle and others. During cross-examination of Shelton, the defense attempted to show that Shelton had, in fact, violated 21 U.S.C. § 848 (the continuing criminal enterprise statute) and was thus subject to a potential sentence of life without parole; facing such an "air-tight" sentence Tindle contended would insure that Shelton would go to all lengths to please the government and assist in the prosecution of Tindle. The district court, however, restricted defense counsel to questions about the *actual* charges lodged against Shelton and to items specifically mentioned in the government's plea letter. Tindle contends that the district court's ruling deprived him of his sixth amendment right to confront the witnesses against him.

During cross-examination of Shelton, the jury learned that he was a convicted felon who has had a longstanding career as a successful drug dealer. They also learned that through his plea agreement with the government, he had "exposure to up to 33 years of federal and state incarceration as a result of [his] guilty plea" to charges in Virginia. While it would not have been an abuse of discretion to allow questioning regarding possible § 848 violations, it was not an abuse of discretion to disallow such questioning. The nature of discretionary matters is that they normally may properly be decided either way. The jury already heard ample evidence about a life laced with crime, deceit, and drug use. They knew he already faced over thirty years in prison. The district judge was simply limiting potentially expansive, time-consuming cross-examination. *See* Fed.R.Evid. 611(a).[10]

Even were we to assume that the district judge did abuse his discretion with respect to the limitation placed on Shelton's cross-examination, such abuse, nevertheless, constituted harmless error. That is, a reasonable juror, having heard all of Shelton's testimony on cross-examination, inevitably viewed Shelton's direct testimony with some skepticism, even without hearing about a possible sentence of life without parole.

We turn to Tindle's penultimate allegation of error. Tindle was charged with distributing heroin on four separate dates: June 8, 1982 (Count VI), September 15, 1982 (Count IX), September 30, 1982 (Count X), and November 17, 1982 (Count XIII). Tindle did not request an entrapment instruction as to Count VI. With

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[10] Rule 611. Mode and Order of Interrogation and Presentation

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

respect to Count IX, Tindle did request an entrapment instruction and received it. As to Counts X and XIII, the district court denied Tindle's request for such an instruction. Tindle claims that the district court's refusal to instruct the jury on entrapment as to Counts X and XIII constituted reversible error. We disagree.

It is true that the government furnished opportunities, through the use of undercover agents and government informants, for Tindle to commit the narcotics offenses in question. However, in *Sorrells v. United States*, 287 U.S. 435, 441, 442, 53 S.Ct. 210, 212, 213, 77 L.Ed. 413 (1932), the Supreme Court acknowledged that "[a]rtifice and stratagem may be employed to catch those engaged in criminal enterprises." The Court, though, did stress that "[a] different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." In the instant case, there was overwhelming evidence that Tindle was not "an innocent person" induced to distribute heroin but rather was a person predisposed to commit the crimes charged. *See Crisp v. United States*, 262 F.2d 68, 69 (4th Cir. 1958) (district court justified in not submitting entrapment issue to jury as to one defendant given there was no evidence of "inducement," only "opportunity"). Tindle starkly failed to make a showing of "unreadiness on his part or of persuasion by the [government]." *United States v. DeVore*, 423 F.2d 1069, 1071 (4th Cir. 1970), *cert. denied*, 402 U.S. 950, 91 S.Ct. 1604, 29 L.Ed.2d 119 (1971). Without such a showing of "overreaching inducive conduct on the part of the government" and lack of predisposition, the district court acted properly in refusing to instruct the jury on entrapment as to the two counts in the indictment. *Id.*

And, lasly, Tindle alleges that there was insufficient evidence to sustain his conviction on Count X (Septem-

ber 30, 1982 distribution) of the indictment. Suffice it to say, the jury heard ample testimony about Tindle's participation in the heroin transaction on the date in question. There were several telephone calls between Tindle and Shelton before September 30 in which Tindle indicated his willingness as sell a substantial quantity of heroin to an undercover buyer, using Shelton as an intermediary. Also, although Tindle did not actually distribute the heroin to Shelton—Tindle's associate, Greer, met with Shelton and physically distributed the package —there was an October 15, 1982 telephone call between Shelton and Tindle which demonstrated Tindle's knowledge that the "deal" had been consummated on September 30.

Despite the foregoing, in *Batson v. Kentucky*, —— U.S. ——, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court decided that systematic exclusion of one race from a jury is a denial of equal protection making it necessary for this case to be remanded so that the district court may decide whether there was any merit to Tindle's claim of systematic exclusion.

REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-6096

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

ISAAC JAMES TINDLE,
Defendant-Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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ORDER

[Filed Dec. 20, 1988]

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court.

On the question of rehearing before the panel, Judge Murnaghan voted to rehear the case. Judges Chapman and MacKenzie voted to deny.

In a requested poll of the Court on the suggestion for rehearing in banc, Judges Murnaghan voted to rehear the case in banc; and Judges Winter, Russell, Widener, Hall, Phillips, Sprouse, Ervin, Chapman, and Wilkinson voted against in banc rehearing. Judge Wilkins was disqualified and did not vote.

As the panel considered the petition for rehearing and is of the opinion that it should be denied, and as a majority of the active circuit judges voted to deny rehearing in banc,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman.

For the Court,

/s/ John M. Greacen
JOHN M. GREACEN
Clerk

EXCERPT FROM JURY INSTRUCTION CONFERENCE

* * * *

THE COURT: If you want further argument? I don't know why I need it. But if you want to argue further, fine. But I don't want to hear any tomorrow morning.

All right, we'll take a 15-minute recess.

(There was a 15-minute recess.)

THE COURT: All right, any further argument on instructions?

MR. ROBINSON: Yes, Your Honor, I think I can clarify a lot of things as far as my request for instructions. I think we've already covered those but before entrapment and what we said before, the record is clear, no need to go through anything else. So does the Court want to hear briefly what I had to say in conclusion on entrapment?

THE COURT: Sure.

MR. ROBINSON: All right, I've been discussing with Mr. Cobb. I think that the law is that when the pattern of all the Abscam cases, and all the cases, Your Honor, is the government, through a government agent, which clearly Shelton was, gives the defendant an opportunity to commit a crime. That is the inducement.

All right, now, Shelton, uncontradicted, admits he did that precisely, and that was his motive from June 8th, to get in a position to do that.

Now, there's a lot of testimony from Tindle that there were conversations setting this up between Shelton and Tindle prior to September 13th of '82, and that in fact on the 13th and 14th, Shelton called, unreported—now, whether that's credible or not is for the jury to decide. Tindle said there were a couple of calls he didn't hear any tape recording on, within a couple days before the 15th call, he said that on the stand—in which Shelton

got him to agree to participate in this, to help him for these various reasons.

Then Shelton calls on the 15th and they discuss the deal and the deal is struck.

All right, now, without even getting to predisposition, it's clear that but for Shelton contacting Tindle on the taped call and the two calls on the 13th and 14th, which Tindle describes which again is a credibility question for the jury, there would have been no such contact at that point because it was a contact initiated by the government agent to Tindle, to see if he, given the opportunity to commit a crime, would in fact commit it. Now, that is the inducement.

Tindle then enters the conspiracy or a continuing criminal enterprise at that point with the entrapment as his defense. The jury will have to decide, was he predisposed at the time he made the decision, to jump over the stick and get in on the conspiracy—if that's where they think he got into it, was he ready, willing and able. Tindle said that he wasn't. He said that he had been ten years ago and he retired.

Now, he denied, repeatedly, getting involvement in drugs and giving five instances of drug deals he turned down in the intervening five years, and he denied getting involved with Alvin Kotz. Alvin Kotz, that was on a cocaine deal. Kotz's name is confirmed here. He was involved with Agent Rocco and leading them to Suskind. He denies the drug deal opportunity with Jim Bevenue, who is an unlicensed law degree holder in Mr. Suskind's office. He denies involvement with Herb Suskind's request on the Rocco case to see if he would get involved in South America to do a drug deal—all these with no predisposition, Your Honor, at least state of mind predisposition, not as to inducement.

He denies participating in the Box Greer deal, undercover deal, which was back in '81, which would go to confirm. There again, the jury has to accept his word but these are facts recited by Tindle to show that during

the time in question he was approached to do drug deals and turned them down, which means he was not predisposed.

Finally, this fellow Bobby, some young man named Bobby, from Richmond, was with Shelton and Shelton admits that, immediately prior to June 8th of '82, and Shelton was trying to get dope. He made a trip throughout the east. Shelton finally said he went to Philadelphia to see a fight or something. But Tindle says Bobby and Shelton were there early in June, late May of '82, trying to get dope. Tindle told them no.

Now, Bobby at that point was a government agent working for law enforcement against Shelton. So we have five instances, Your Honor, of Tindle rejecting drug deals. Now, these don't go to the inducement that we have in September but they go to confirm that he was in fact retired from drugs or not participating in those instances where there's evidence of no predisposition.

As we go through the summer of '82 and come up through the 13th, Shelton calls a couple of times, unreported, facts for the decision of the jury. On the 15th, he calls, asked I.J. about a deal. Tindle agrees. Tindle agrees that that deal occurred. Thereafter he did in fact do it and he did it to help Shelton raise money to prevent himself from losing the property he had posted, and to help a friend. But he did it, he said, because of the urging of Shelton. Inducement.

On the 30th of September, Mr. Cobb maintains that Tindle did not admit participating in that crime. What Tindle said—at first he said no, on cross-examination. Then I was accused of coaching him, but whether I coached him or not, he did in fact say, following that, that Mr. Cobb, "What I'm saying is that all these conversations that I had with Shelton occurred. I did what was said on those phone conversations but I did them because Shelton was a friend and needed the favor and I was helping him for these reasons."

And so he admitted all involvement in all conversations with Shelton, and whether that relates to the 30th or October 2 or whatever, he admitted participating and gave the reason for participating, for having done it as a favor to Shelton who's acting as a government agent, who's giving him the opportunity to commit a crime.

On the 17th of November—the count, I believe, the 13th—

MR. COBB: What's that?

MR. ROBINSON: The 17th of November.

MR. ROBB: Right.

MR. ROBINSON: Tindle admitted that there had been a call, he said unreported, between Shelton and he—and then that again is Tindle's credibility. He denies—he does all these figures, too. He has to answer for those figures. But it's his testimony, Your Honor, that there was a conversation with Shelton when Shelton said that he was coming to get this drug—these drugs.

All right, based on that conversation, he goes and sees Greer. Tindle goes and sees Greer and Greer gives him the bag of dope, that when Greer makes it clear to Tindle that the dope is going to be given to this Willie from North Carolina who is an agent, Tindle returns the dope to Greer and says that's between you and Willie, and you deal with Willie. I'm doing something for Johnny.

Tindle admitted touching that dope. He admitted being involved in that transaction but he admitted doing so for Shelton at Shelton's urgings, and withdrew from further participation when he found that Willie was going to be there instead of Shelton.

So he admitted the crime because, as Your Honor knows—

THE COURT: He didn't admit the crime. He just said he withdrew from the crime.

MR. ROBINSON: He aided and abetted the furtherance of that crime based on the inducement from Shelton.

THE COURT: He's going to have to make up his mind. If he wants to have entrapment, he's going to have to admit all the way through.

He testified that he didn't want anything to do with it. Here are my notes. He didn't know anything about it. He didn't want to know anything about it. And he didn't know the man and he's got to admit the entire offense.

MR. ROBINSON: I agree with that.

THE COURT: Now, you can argue, very well, what he should have done and what he shouldn't have done but there it is, and you've got to decide, if you're coaching him, tell him, "Look, entrapment, and if it's entrapment, you've got to admit it all the way down the line." And he didn't do that.

MR. ROBINSON: Well, with all due respect—

THE COURT: And he avoided it, particularly as to that one. It's very clear.

MR. ROBINSON: Well, Your Honor, I resent, if there's any suggestion—with all due respect—that I coached him.

THE COURT: You used the word.

MR. ROBINSON: Well, coaching with reference to an objection is fine but if there's a suggestion that I coached him how to testify—

THE COURT: I'm using your words. I was using your words which you used a few minutes ago.

Do you have anything further? It's not very helpful. I gave you two hours to argue tomorrow, not tonight.

MR. ROBINSON: Your Honor, all I'm saying is that Tindle admitted participating in touching some dope on November 17th because of the phone call he had with Shelton. He's entitled to an instruction on entrapment on that period of time in which he was involved. Once he gave the dope back, he withdrew. Therefore there is a denial from that point. But under the law, if Tindle went to see Greer on Shelton's urging, on an unrecorded call, and got dope, and was going to aid the distribution

of that dope and then gave the dope back, the jury could be very severely confused as to what the law is there. All I'm saying is that on November 17, just like on September 30th, he's entitled to an instruction on his admissions, that he did participate to the degree that he did something to further that distribution based on conversation with Shelton, and if the jury believes that Tindle participated or aided and abetted those distributions because of contact or inducements of Shelton, that he's entitled to raise entrapment.

If the jury believes that he participated but was not doing so at the urgings of Mr. Shelton, then he's not entitled to raise entrapment. But he did admit participation in those acts, Your Honor.

THE COURT: All right, you've said it five times. I understand your argument.

Do you have anything, Mr. Cobb?

MR. COBB: Nothing further, Your Honor, unless you have a question based on Mr. Robinson's argument.

THE COURT: All right, the ruling on entrapment is this: I am going to instruct the jury that the entrapment defense applies to count 1, the conspiracy but we have to divide the times. It applies after September, early September of 1983, to portions of the conspiracy but that is up to the jury to determine that.

I will advise the jury as to counts 8 and 9, the entrapment defense can be asserted.

MR. ROBINSON: Counts what, Your Honor? I'm sorry.

THE COURT: Counts 8 and 9. Those are the September 15th. One of them is the telephone. One of them is the distribution. I will instruct the jury that the defense of entrapment is not available as to counts 10 and 13. It's abundantly clear that the defendant must admit the crime before he can raise that defense. He did admit it as to counts 8 and 9. He did admit it as to the portions of the conspiracy. But his testimony was very clear on cross-examination, on September the 30th,

he said he had nothing to do with it, and whether you have an aiding and abetting or whatever theory that counsel tries to construct, the law is very clear that you don't get entrapment unless you've committed the offense.

And the same is true on count 13, November 17. He said he didn't know anything, he didn't want to do anything. If you're going under a theory of aiding and abetting, there has to be knowledge, and he specifically denied it. So entrapment is one of the places where you have to fish or cut bait. You can't have it both ways. And his defense, from what he said on the stand, was that he didn't do it. So I will instruct the jury accordingly as far as entrapment is concerned.

Now, as far as the continuing criminal enterprise, we haven't discussed that but I think that's covered in the continuing criminal enterprise instruction because they are told that they have to find so many series of events and so on, and it depends what their findings are on the first indictment before they get into the next one, and so, as far as the Court is concerned, I'm not sure I can instruct them anything on that as far as where it applies. You can argue when we talk about the series of events, and so forth and so on, but I don't think we have any information on continuing criminal enterprise. None was submitted. So we're not going to construct one out of thin air.

Now what else do we have?

MR. COBB: Your Honor, the government did submit a CCE instruction.

THE COURT: Well, talking about the entrapment.

MR. COBB: I'm sorry.

THE COURT: As applied to that. When you get into that, you get into all sorts of complications and it says that you have to find these series, so they have to find that first, and if they find that it's an entrapment and that is not one of them, then of course that would cover it.

Now, what else did we have that I haven't ruled on?

MR. COBB: Defense theory of the case, previous intent, Your Honor.

THE COURT: All right, you're requesting that I not give it at all because the predisposition or lack of inducement—and I'll rule against the government on that. I think the evidence is very slight. It certainly is unusual where you have to have proof of inducement, that he talks about friendship. But I think there's enough to go to the jury on that.

The mere fact, as has been argued here a few minutes ago, of giving them the opportunity to commit the crime, that's not a question of inducement. Inducement refers to something or some sort of overreaching conduct. And I think there is some evidence of that, enough to go to the jury on those particular counts.

As far as predisposition is concerned, I think the testimony of the defendant himself is that he wasn't predisposed at that time.

Now we do have those particular instructions that the defendant requseted and let me rule on those. Those were the two additional instructions.

Defendant's theory of the case: I'm going to tell the jury that it is the defense theory on these certain counts —and those are the only ones that it can be argued on— that the defendant was entrapped. I'm not going to give the rest of that. That's argument on the facts. You can argue the facts both ways. It's comment on the evidence and if I were to do it on the defendant's side, I'd have to do it on the government's side and we'd have to go into all the evidence in the case. So in essence on that one, I give the first paragraph. I don't give any of the rest of it.

Now, the next one, previous intent or purpose, I will include in the instruction that it refers to state of mind at the time of the inducement or persuasion. That's about the second sentence.

The rest of that, again, you can argue. I give them an instruction on intent, what they have to find as far as intent. That would cover this intent.

But the point there is that, particularly in view of this testimony, that it is the time of the alleged entrapment when you look at the defendant's state of mind So that's what I'll give on that instruction.

* * * *